COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company d/b/a NSTAR Electric	)	D.T.E. 03-121

CONSERVATION LAW FOUNDATION, INC. ("CLF") OPPOSITION TO NSTAR ELECTRIC MOTION TO STRIKE FIRST SET OF INFORMATION REQUESTS OF CLF TO THE SOLAR ENERGY BUSINESS ASSOCIATION OF NEW ENGLAND ("SEBANE")

On March 22, 2004, in the normal course of discovery, CLF, a party to this proceeding, served and filed an Information Request on another party to this proceeding, SEBANE. NSTAR Electric ("NSTAR") has moved to strike that Information Request. The gravamen of NSTAR's motion seems to be that CLF and SEBANE are not adverse to each other and that (under a "discovery rule" NSTAR refers to without citation to any statute, regulation or precedent)[1] somehow CLF and SEBANE are barred from making discovery requests to each other. Specifically, NSTAR's essential contention seems to be that since CLF and SEBANE jointly sponsored one witness, Thomas Michelman, that CLF is barred from making discovery requests to SEBANE regarding the testimony of a different and separate witness sponsored by SEBANE, Andrew Greene. NSTAR's odd and unsupported assertion that CLF and SEBANE should be regarded as presenting a "combined case" with regard to all witnesses is false on its face and can not be used to support NSTAR's suggestion that CLF and SEBANE are somehow covertly and improperly supplementing the record.[2]

[1] It is far from settled that there is any general doctrine forbidding "friendly cross examination", what the parameters of that doctrine are and if it is applicable in this situation at all, during discovery. Indeed, Massachusetts case law strongly suggests that all parties to administrative proceedings have a general right to fully examine (and cross-examine if appropriate) all relevant witnesses, friendly or hostile. See e.g., Palmer v. Rent Control Board of Brookline, 7 Mass. App. Ct. 110, 115-117 (1979). In the absence of any case law or other support for NSTAR's assertions on this subject CLF relies on the well-settled rules and precedents regarding discovery in general.

[2] There is no support for NSTAR's vague and unsupported argument that the Information Requests are improper because CLF and SEBANE are somehow overly friendly. Even if this argument had any validity with regard to a witness that CLF and SEBANE jointly sponsored it is inconceivable that this "theory" can be used to disqualify CLF from making discovery requests regarding a witness it did not sponsor to a party it happened to sponsor another witness with. Such a result would work a revolution in DTE proceedings, discouraging parties from jointly sponsoring witnesses and unduly delaying countless future proceedings.

As discussed below NSTAR's motion is unsupported by the rules of the Commission, the case law and rules generally governing discovery during litigation of all sorts in the Commonwealth and relies upon incorrect and unsupported assertions of "fact."

Introduction

NSTAR's motion fundamentally does not acknowledge that:

> The purpose for discovery is to facilitate the hearing process by permitting the parties and the Department to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of issues, protect the rights of the parties, and ensure that a complete and accurate record is compiled.
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> 220 CMR 1.06(6)(c)(1).

In overseeing discovery "'the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 et seq.' will guide the hearing officer . . . " In Re Fiber Technologies, DTE 01-70, 2002 WL 32,101,642, *15 (December 24, 2002) citing and quoting 220 CMR 1.06(6)(c)(2). The administration of that rule, and the parallel federal rule and its predecessors, highlight the broad and inclusive nature of contemporary discovery and the reluctance that all tribunals should show in striking, quashing or otherwise rejecting discovery requests. Strom v. American Honda Motor Co., 423 Mass. 330, 336, 667 N.E.2d 1137 (1996), quoting from Hickman v. Taylor, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

CLF's Discovery Request Seeks Relevant Elaboration of Direct Testimony

The first three of CLF's five Information Requests to SEBANE asked for clarification and explanatory analysis regarding the environmental implications of the technology discussed in the testimony of SEBANE's witness and of the rate at issue in this proceeding. Given the obligation of the Department, pursuant to M.G.L. c. 30 s. 61 to "review, evaluate, and determine the impact" of its decisions on the environment this information is highly relevant. Moreover, the information requested is a logical elaboration on the Direct Testimony of SEBANE's witness. CLF elicited a similar analysis

from a witness it sponsored, Thomas Michelman, who testified regarding a different technology (wind power). See, Exhibit CLF/SEBANE-TSM-1 at p. 12.[3]

CLF's fourth Information Request to SEBANE sought clarification of a technical detail uniquely within the skill and knowledge of SEBANE's witness and, again, was modeled on questions posed to and answered by CLF's witness, Thomas Michelman. See, Exhibit CLF/SEBANE-TSM-1 at pp. 12-13.

CLF's fifth Information Request was that most common and innocuous of discovery requests- a request for a witness to provide a rationale for a statement made in direct testimony. The fact that NSTAR is seeking to strike this request highlights the inherent absurdity of the motion at bar.

The Policies and Precedents Regarding Discovery Practice Require Denial of this Motion

NSTAR's motion does not dispute the requested information is relevant to this proceeding. Given the lack of dispute regarding relevance we should remember the departmental precedent holding that, "Department regulations and precedent as well as state and federal law place a heavy burden on the Company to establish that relevant information should be blocked from discovery." In Re Western Massachusetts Electric, D.P.U. 92-8C-A, 1993 WL 343,417, *14 (June 25, 1993) and cases cited therein.

NSTAR's motion does not claim that SEBANE complying with this request would somehow delay this proceeding. Indeed, CLF's request will result in disclosure of information that would otherwise be elicited at hearing during cross-examination and will help build the "complete and accurate record" while saving valuable hearing time- key goals of discovery as described above.

[3] NSTAR's motion notes in a footnote that CLF refrained from making any discovery to NSTAR regarding NSTAR's direct case, implying that CLF had somehow waived its right to make discovery at a later stage in the proceeding. CLF is focused, appropriately given our mission, on the environmental implications of the rate at issue and the implications of the rate on deployment on potentially environmentally friendly technologies like renewable energy. As was amply demonstrated in the discovery record developed in the since-withdrawn "NSTAR Green" proceeding (D.T.E. 03-100) these are not areas where NSTAR, or its employees and consultants can provide useful or relevant information and discovery of the Company on this subject would be a waste of time and effort. Moreover, it would be absurd to penalize CLF for its moderation and discretion in not making unneeded discovery.

NSTAR also fails to assert that SEBANE complying with this request will harm or prejudice NSTAR. In considering discovery motions the Department has focused on this question of harm, taking extraordinary steps, like the use of non-disclosure agreements, to mitigate potential harm from public disclosure of sensitive information. See e.g., Western Mass. Electric at *15-*16, and In Re Boston Gas, D.T.E. 03-40, 2003 WL 22,964,772 (October 31, 2003). In a case such as this, where the objecting party is not the subject of the discovery request, where there is no issue regarding the disclosure of sensitive or confidential information and no allegation that disclosure would cause any harm to the objecting party the Department should reject the motion to strike.

For the foregoing reasons, NSTAR's motion should be denied.

Respectfully submitted,

CONSERVATION LAW FOUNDATION, INC.
By its Attorney

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March 26, 2004

CERTIFICATE OF SERVICE

I certify that I have served a true copy of the foregoing document on the persons listed in the service list in accordance with the requirements of 220 CMR 1.05, this 26th day of March 2004.

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Seth Kaplan
Attorney for Conservation Law Foundation